United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1296-97

To be argued by
MICHAEL B. POLLACK

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

HAROLD ROSENBERG and JAMES F. HEIMERLE,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANT-APPELLANT JAMES F. HEIMERLE

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BRIEF FOR THE DEFENDANT
JAMES F. HEIMERLE

PRELIMINARY STATEMENT

James F. Heimerle appeals from a judgment of conviction entered on May 5, 1976 in the United States District Court for the Southern District of New York, after a three day trial before the Honorable Charles M. Metzner, United States District Judge, and a Jury.

Indictment 76 Cr. 146, charges James F. Heimerle in four counts with three counts of selling counterfeit Federal Reserve Notes (Counts One, Two and Three) and in Count Four with conspiracy to sell counterfeit Federal Reserve Notes.

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On May 3, 1976, the trial commenced and it ended on May 5, 1976 when the jury found Heimerle guilty on all Four counts.

On June 15, 1976, Heimerle was sentended to concurrent seven year terms of imprisonment on the first selling count and the second selling count; a sentence of five years of imprisonment on the conspiracy count to run concurrent with the sentences on the first selling count and the second selling count, as well as a consecutive five year term of probation on the third selling count to commence upon the expiration of the sentences imposed on the first selling count and the second selling count.

Heimerle is presently incarcerated pending this appeal.

STATEMENT OF FACTS

The Defendant's Case

Defendant James F. Heimerle testified in his own behalf. He testified to knowing an individual named Julian Mossep, known to the government as Julian Mitchell (Tr p. p.181-182). That this individual contacted him in December 1975 concerning money that "Mitchell" owed to the defendant (Tr p. 185-87). On January 28, 1976, Julian Mitchell contacted the defendant Heimerle and asked to meet him at a Joyce's Pub for the stated purpose of repaying a part of the money owed by Mitchell to the defendant. (Tr p. 186-87). During this meeting the defendant Heimerle received $300 in cash from Mitchell, and, in addition was introduced to an individual, who unknown to the defendant was an undercover agent for the Secret Service, (Tr p. 187-88). Further, during the time the three were

together in defendant Heimerle's car, Mitchell gave the undercover agent an envelope in return for which Mitchell received money from the agent. Mitchell then gave $300 of the cash received from the agent to Heimerle. (Tr p. 187-88).

Heimerle testified that subsequent to January 28, 1976, he had a lunch meeting with Mitchell and that Mitchell called him and asked for Heimerle to meet him at Joyce's Pub on February 2, 1976 (Tr p. 190-191), a meeting for which Mitchell did not show up. (Tr p. 191-92). Heimerle testified that he had a scheduled meeting with Mitchell on February 5, 1976. Similar to the occurrence of February 2, 1976, Mitchell was not present at the appoint time, but the undercover agent McDonell was there. (Tr p. 194). Eventually on February 5, 1976, Heimerle met with Mitchell and received a package from him for delivery to "Frank" the undercover agent (Tr p. 195). When Heimerle gave this package to the undercover agent in the early morning hours of February 6, 1976, he was arrested. (Tr p. 195).

The Government's Case -- Frank McDonell Special Agent, U. S. Secret Service testified that on January 28, 1976, he was assigned as an undercover agent. That on this date, he went to Joyce's Pub located at 50th Street & Second Avenue, New York City. Here he met Julian Mitchell, who was acting in the capacity of informant for the U. S. Secret Service. (Tr p.9-10). At this meeting, he gave Mr. Mitchell

$300 in prerecorded bills. Mitchell then left the pub, returned and then the two of them left the pub. Outside the pub Mitchell introduced Agent McDonell to defendant Heimerle. (Tr p.10-12). The meeting between the three gentlemen took place in Mr. Heimerle's car. Mr. Heimerle and Mitchell in the front seat and agent McDonell in the back seat. Agent McDonell testified that at this meeting he gave to Mitchell $600 in marked funds. Sometime after Mitchell and agent McDonell returned by themselves to the pub. Mitchell gave the agent a brown envelope allegedly containing counterfeit notes that Mitchell had allegedly obtained from the defendant Heimerle (Tr p. 12-15). Agent McDonell testified of a second meeting with Mr. Heimerle on February 2, 1976. Allegedly McDonell again entered the defendant's car and paid the defendant $600 in prerecorded funds for a package of allegedly counterfeit Federal Reserve notes (Tr p. 16). Allegedly, a third meeting occurred on February 5, 1976 between defendant Heimerle, Agent McDonell and Special Agent Jane Bisacquino. McDonell and Heimerle, alone allegedly entered the defendant's car and discussed "a buy" of counterfeit treasury notes. (Tr p. 21-23). Allegedly McDonell called the defendant Heimerle at around 12 o'clock midnight of the same evening. A meeting was decided upon for the early A. M. of February 6, 1976, at the Brasserie Restaurant on 51st St, New York. From the restaurant Heimerle allegedly took agent McDonell to the Ramada Inn where they proceeded to room 1026. They then went out to the car and shortly thereafter a man, allegedly the defendant Rosenberg

came out from the hotel, handed the defendant Heimerle a package, which was then given to Special Agent McDonell. This package allegedly contained $32,600 in counterfeit Federal Reserve notes (Tr 24-31). Subsequently thereafter defendant Heimerle was placed under arrest. (Tr p. 33). Special Agent Zoma testified that on January 28, 1976, he maintained surveillance outside of Joyce's Pub. That on this date, he saw the defendant's Heimerle's car parked outside the pub, an unidentified gentlemen approached the car, said gentlemen then went into the pub and return to the car accompanied by Special Agent McDonell (Tr p. 77-80).

Agent Zoma stated that on February 21, 1976, he surveilled Agent McDonell and defendant inside Joyce's pub.

Special Agent Gilmartin testified that he was on surveillance at Joyce's Pub on January 26, 1976, where he observed Special Agent McDonell and Julian Mitchell. (Tr p. 84-86). That on February 2, 1976 he took photographs of Heimerle and McDonell (Tr p. 88).

Jane Bisaquino, Special Agent, United States Secret Service testified to meeting defendant Heimerle while with McDonell at Joyce's Pub on February 5, 1976. (Tr p. 118) and at La Brasserie Restaurant on February 5, 1976 (Tr p. 121).

Special Agent George P. Hemmer, Jr. United States Secret Service, testified to observing Heimerle at a Pathmark Supermarket at 12 o'clock midnight on February 5, 1976 and that Heimerle went over to a pay telephone (Tr p. 126-27).

John Flynn, night manager at Ramada Inn, 790 Eighth Avenue, New York City testified he was on duty the evening-morning of February 5-6, 1976 (Tr p. 135).

Ante Antolos, bellhop, Ramada Inn, 790 Eighth Avenue, New York City testified he was working on the evening-morning of February 5-6, 1976 (Tr p. 142).

United States Secret Service, Special Agent James Edward Heavey testified that he supervised the marking and recording of the funds given to McDonell on January 26, 1976 (Tr p. 153) and that he arrested Heimerle on February 6, 1976 for the sale of counterfeit one hundred dollar Federal Reserve Notes. (Tr p. 154). Agent Heavey further testified that at the time of Heimerle's arrest, he had in his possession a genuine $100 Federal Reserve Note, which had been given to Agent McDonell on January 26, 1976. (Tr p. 155). Agent Heavey gave expert testimony that Government exhibits 4, 5 and 8 in evidence were counterfeit Federal Reserve Notes. (Tr p. 158-162).

1. THE TRIAL JUDGE ERRED AS A MATTER OF LAW IN HIS CHARGE TO THE JURY.

A. The Concept of the Missing Witness

Throughout the course of the entire trial the name of Julian Mitchell was infused into testimony. Julian Mitchell was admitted to be an informant for the United States Secret Service (Trial Transcript p. 10) hereinafter referred to as "Tr"). In addition, at the time of trial, Mr. Mitchell was under indictment and awaiting trial on a charge of possessing counterfeit Treasury bills (Tr p.51). Neither the government nor the defendants called Mr. Mitchell as a witness in the present action. In his charge to the jury concerning this individual, Judge Metzner charged:

> I point out to you that Julian Mitchell is not under the control of either the government or the defendants. Either side could have subpoenaed him to appear as a witness. Therefore, you are free to draw whatever inference you wish as to the failure of the government or Heimerle to call him or you need not draw any inference if you do not wish to. (Tr p. 316).

Counsel for defendant Heimerle specifically excepted to this part of the Judge's instructions. (Tr p. 318). The general rule of law, commonly referred to as the "missing witness" rule devolves from Graves v. United States, 150 U.S. 118 (1893).

> The rule in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced would be unfavorable. Id. at 121.

In his charge to the jury, the trial judge seeks t reply upon the often repeated exception to the rule, i.e.. the witness was equally available to either side. See, 1 Wharton, Criminal Evidence 268-69 (12th ed., Anderson, 1955); 2 Wigmore, Evidence 169-70 (3d Ed. 1940)

B. Determining Equal Availability

The general rule concerning the "missing witness" applies unless the exception is proven. In ruling upon this issue,

> "The availability of a witness is not to be determined from his mere physical presence at the trial or his accessibility for the service of a subpoena upon him. On the contrary, his availability may well depend, among other things, upon his relationship to one or the other of the parties, and the nature of the testimony that he might be expected to give in the light of his previous statements or declarations about the facts of the case. McClanahan v. United States, 230 F2d 919 (5th Cir.); cert. denied 352 U. S. 824 (1956).

See also: United States v. Blakemore, 489 F2d 193 (6th Cir. 1973); United States v. Johnson, 467 F.2d 804 (1st Cir. 1972). In the present case Judge Metzner determined Mitchell to be equally available, solely on the fact that:

> Either side could have subpoenaed him to appear as a witness. (Tr p. 316).

In applying the Graves rule, the courts have developed a dual pronged test:

> (1) Is it peculiarly within a party's power to produce the witness; and
>
> (2) Would the witness' testimony elucidate the transaction. United States v. Young, 463 F.2d 934 (D.C. Cir. 1972); Bradley v. United States, 420 F.2d 181 (D.C. Cir. 1969).

In attempting to prove Mr. Mitchell's availability to the defense, the prosecutor informed the trial judge that the government had provided the defense with the name of Mitchell's counsel. Conversely, the testimony points out that Julian Mitchell is (1) under Federal indictment (Tr p. 51); (2) an informant for the Secret Service (Tr p. 10); and (3) as argued at time of trial, entitled to assert his Fifth Amendment privilege unless granted immunity by the Federal Government (Tr p. 319). (See, Bradley v. United States, 420 F.2d 181 [D.C. Cir. 1969] where the court commended the careful conduct of defense counsel who refrained from the tactic of subpoenaing a witness he knew would plead the privilege against self-incrimination.)

In an analagous situation it was held:

> The testimony showed a relationship between the government and the informer which placed it peculiarily within the power of the Government to produce him if we are to give any meaning to the idea expressed by the term "peculiarly: Burgess v. United States, 440 F.2d 226, 232 (D.C. Cir. 1970).

As an informer, it was Julian Mitchell who introduced Agent McDonell to the defendant Heimerle (Tr p.11). Furthermore, it is testified that Mitchell is present during the entire course of one transaction (Tr P. 12-20) and acted as an intermediary in others. Who, more than an eye-witness, participant informer can aide in the eludication of the facts.

C. Prejudicial Effect of the Instruction

The instruction, as given, was nearly identical to the one approved by this Court in United States v. Deutsch, 451 F.2d 98 (2d Cir. 1971). However, in Deutsch it was determined that the uncalled witness was available to both sides. An informer occupies a markedly different posture than a co-defendant who had pled guilty. Cf. Moyer v. United States, 78 F.2d 624 (9th Cir. 1935). It may be assumed from the nature of his function, the informant will possess "a hostile disposition toward the defendant. United States v. Johnson 467 F.2d 804, 809 (1st Cir. 1972) cert. denied 410 U.S. 909 (1973). Lack of a particular witness' testimony often indicates a weakness in the prosecution's case. Cf. Burgess v. United States, 440 F.2d 226 (D.C. Cir. 1970).

> Where the informer, who certainly knew about the transactions occurring in his presence, is not called as a witness by the Government, nor shown to be unavailable, we must assume that his testimony would not have been helpful to the prosecution United States v. Di Re 332 U. S. 581, 593 (1947) (Emphasis added).

Wherefore, the defendant Heimerle submits that the failure of the trial judge to give the Graves instruction denied to the defendant, the right to a verdict rendered by a properly instructed jury.

II. THE TRIAL JUDGE ERRED AS A MATTER OF LAW IN NOT DECLARING A MISTRIAL BECAUSE OF THE TRIAL PUBLICITY.

A. Insuring an Impartial Jury

On May 4, 1974, a witness, John Grillo, present in the courthouse pursuant to a defense subpoena, effectuated an escape from his custody by the United States Marshals. This event occurred after the court session had concluded for the day and the jurors were proceeding home. It was reported in the New York Times, The Daily News and on television. (Tr p. "ards" 3 and 4). When asked by Judge Metzner all fourteen veniremen acknowledged either reading or hearing about the escape. Amendment Six to the United States Constitution secures to the accused the right to a trial "by an impartial jury."

> The Jury's impartiality must be kept free from any outside influence, whether of private talk or public point. Silverthorne v. United States, 400 F.2d 627, 643 (9th Cir. 1968) (Emphasis added); Accord: Patterson v. Colorado, 205 U.S. 454 (1904).

Subsequent to this a priori determination of knowledge on the part of all jurors Judge Metzner posed one other inquiry to them.

> I ask whether you thing (sic) that despite what I told you, your judgment would still be affected by the story? (Tr "pgds" 10).

Each juror and alternate, in the presence of one another, responded in the negative. In recognition that such events as the present one may occur effecting an accused's right to an impartial jury the American Bar Association Project on Standards for Criminal Justice, Standards Relating To Fair Trial and Free Press (hereinafter "Standards") 3.2 (e) suggests the following procedure:

> Whenever there is believed to be a significant possibility that individual talesman would be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of each chosen prospective jurors. (Emphasis added).

Accord: United States ex. rel. Doggett v. Yeager, 472 F.2d 229 (3d Cir. 1973); United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972) ("Such jurors who respond affirmatively must then be examined, individually and outside the presence of other jurors, to determine the effect of the publicity"); Margoles v. United States 407 F.2d 727 (7th Cir.); cert. denied 396 U. S. 833 (1969); Silverthorne v. United States, supra.

The District Court's response to the publicity of the events of May 4, 1975 were insufficient to protect the defendant's Constitutional rights. See generally Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959) cert. denied, 368 U.S. 855(1961) where the court stated:

> The inquiry made of the jurors by the court concerning their reading of the newspaper articles was not adequate for the protection of the defendant. The court knew which of the regular jurors had read the newspaper articles. No individual inquiry was addressed to these persons as to the possible influence of the articles upon each of them. Only a general and very brief inquiry was made of the jury as a whole. There was even then no admonition that jurors who had read the articles must not reveal their purport to the remaining jurors. It is too much to expect of human nature that a juror would volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial.

> Not only so, but had one or more of them said they would be so influenced and especially if they had then explained why, the damage to the defendant would have been spread to the listening other jurors. In view of the nature of the articles, the court should have made a careful, individual examination of each of the jurors involved, out of the presence of the remaining jurors, as to the possible effect of the article. Id. 272 F.2d at 507-508.

The fact that each juror responded negatively to the general, almost perfunctory inquiry of the judge "does not establish that the publicity could not have prejudiced any member of the jury". Silverthorne v. United States, supra. at 640; Accord: Henslee v. United States, 246 F.2d 190, 193 (5th Cir. 1957).

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact required such a declaration before one's fellows is often its father. Irvin v. Dowd, 366 U. S. 717, 728 (1961).

B. Actual Prejudice Is Not Required.

Although the jurors were admonished concerning any discussion of the evidence between themselves or with anyone else (Tr p. 2), an examination of the record fails to disclose a similar warning as to reading or listening to non-courtroom "facts" concerning the case. Once it is established that publicity, in fact, exists, the inquiry of the Court shifts towards the possibility of prejudice, not its actuality. United States ex rel, Doggett v. United States, supra; Margoles v. United States, supra.; Silverthorne v. United States, supra; Standards, supra. Once it is demonstrated that the

jury has had contact with publicity concerning the case the "accused should not be required to show actual prejudice." United States ex.rel. Stouffer v. Pennsylvania, 374 F. Supp. 702 (M.D.Pa 1974); Accord: United States ex.rel. Doggett v. Yeager, supra. As stated by the court in Coppedge v. United States, supra.

> They [Newspaper articles] contained facts which should not have come to the knowledge of the jury. Had they been told to the jurors verbally by outside parties, the admonition which the court gave the jury would have been punishable if they had not reported the incident, and had they reported it, a mistrial would have been in order. Id. 272 F.2d at 508.

Defendant Heimerle recognizes the fact that the trial judge possesses a certain amount of discretion in ruling on the issue of prejudice resulting from the reading by the jurors of news articles concerning the trial. Marshall v. United States, 360 U. S. 310 (1959); United States v. Feldman, 299 F.2d 914 (9th Cir. 1962). It is submitted that the trial judge abused this discretion in the manner he chose to ascertain the effect of the publicity on individual jurors. As expressed by the court in Silverthorne v. United States, supra.:

> [W]e must spare no effort to secure an impartial panel..., the least that was required of the district court was to conduct a careful examination of each of the jurors.

III. PREJUDICIAL EVIDENCE WAS IMPROPERLY ADMITTED INTO THE RECORD BY THE TRIAL JUDGE.

A. Lack Of Adequate Foundation

Government exhibit number 1, a genuine $100 Federal Reserve Note, found on the person of the defendant Heimerle at the time of his arrest, was admitted into evidence over the objection of counsel for defendant Heimerle. (Tr p. 155-156). James E. Heavey, Special Agent, United States Secret Service testified that the serial number on exhibit 1, corresponded with government exhibit 2, " a xerox of marked money which I gave to Special Agent Frank McDonell for the purposes of making an undercover buy." (Tr p. 153). Furthermore, Special Agent Heavey testified on direct:

Q Do you know what that marked money was used for,

A Yes sir, to purchase counterfeit notes.

The obvious inference that the government desires to be drawn from this segment of testimony is that exhibit one was specially marked money, as indicated by exhibit 2; that exhibit 1 was used to purchase counterfeit notes; that exhibit 1 was found in the possession of defendant Heimerle when he was arrested; ergo, defendant Heimerle was the seller of the counterfeit notes. When real evidence, i.e.the Federal Reserve Note, exhibit 1 is offered in evidence, it is incumbent upon the proponent of the evidence that an adequate foundation be established. This will necessitate testimony that the object offered is the object which was involved in the incident. McCormick, Evidence 527 (Cleary ed, West 1972). The incident, at issue is the

purchase and sale of counterfeit Treasury notes and the object being offered is a $100 Treasury Note. The testimony of Agent Heavey is that on January 26, 1976, he "marked" the note and gave it to Agent McDonell (Tr p. 153). The note next appears on the defendant Heimerle when he was arrested (Tr p. 154-55). Agent McDonell testified that on January 28, 1976, he gave to Julian Mitchell $300 in the prerecorded funds (Tr p. 11). There is no testimony as to which funds were given to Julian Mitchell. It is quite possible that the exhibit 1 was given to Julian Mitchell who gave it to the defendant Heimerle in repayment of the debt owed (Tr p. 187), a transaction wholly independent from any alleged sale of counterfeit notes.

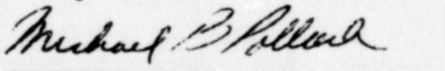
The prejudice to the defendant Heimerle from the admission of exhibit 1 is apparent in two instances. Initially, the emphasis placed upon this exhibit in the prosecutor's summation (Tr p. 245) and, secondly the fact that the jury requested to have it and exhibit 2 brought into the jury room during their deliberation (Tr p. 320). Therefore, the defendant Heimerle submits that there was no proper foundation prepared for the admissability of exhibit 1 and that he was prejudiced thereby.

V. CONCLUSION

For the above stated reasons defendant James F. Heimerle

submits that the verdicts of the District Court should be reversed and this case remanded for a new trial.

Respectfully submitted



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Re: USA v. Rosenberg & Himmels

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Rec. _____ Br. ✓ Notice of Motion _____

On 8/19/76 Clerk Court of Appeals

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

NEW YORK
COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

ROSENBERG & HEIMERLE.,
Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the 19th *day of* August *19*76 *at* One St. Andrews Plaza, New Yrok'

deponent served the annexed Brief *upon* Robert B. Fiske Jr.

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this 19th *day of* August *19* 76

Beth A. Hirsh
BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Victor Ortega
VICTOR ORTEGA